

HEWLETT-PACKARD COMPANY
Intellectual Property Administration
P.O. Box 272400
Fort Collins, Colorado 80527-2400



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PATENT APPLICATION

ATTORNEY DOCKET NO. 10005378 -1

IN THE

UNITED STATES PATENT AND TRADEMARK OFFICE

Inventor(s): Diane R. Hammerstad

Confirmation No.: 4199

Application No.: 09/768990

Examiner: Arthur D. Duran

Filing Date: Jan 23, 2001

Group Art Unit: 3622

Title: Delivery Of Time Significant Advertising

Mail Stop Appeal Brief-Patents
Commissioner For Patents
PO Box 1450
Alexandria, VA 22313-1450

TRANSMITTAL OF APPEAL BRIEF

Transmitted herewith is the Appeal Brief in this application with respect to the Notice of Appeal filed on Jan 30, 2006

The fee for filing this Appeal Brief is (37 CFR 1.17(c)) \$500.00.

(complete (a) or (b) as applicable)

The proceedings herein are for a patent application and the provisions of 37 CFR 1.136(a) apply.

(a) Applicant petitions for an extension of time under 37 CFR 1.136 (fees: 37 CFR 1.17(a)-(d)) for the total number of months checked below:

1st Month
\$120

2nd Month
\$450

3rd Month
\$1020

4th Month
\$1590

The extension fee has already been filed in this application.

(b) Applicant believes that no extension of time is required. However, this conditional petition is being made to provide for the possibility that applicant has inadvertently overlooked the need for a petition and fee for extension of time.

Please charge to Deposit Account 08-2025 the sum of \$ 500. At any time during the pendency of this application, please charge any fees required or credit any over payment to Deposit Account 08-2025 pursuant to 37 CFR 1.25. Additionally please charge any fees to Deposit Account 08-2025 under 37 CFR 1.16 through 1.21 inclusive, and any other sections in Title 37 of the Code of Federal Regulations that may regulate fees. A duplicate copy of this sheet is enclosed.

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to:

Commissioner for Patents, Alexandria, VA 22313-1450

Date of Deposit: 03/28/06

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I hereby certify that this paper is being transmitted to the Patent and Trademark Office facsimile number (571)273-8300.

Date of facsimile:

Typed Name: Raymond A. Jerski

Signature: Raymond A. Jerski

Respectfully submitted,

Diane R. Hammerstad

By: Raymond A. Jerski

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Attorney/Agent for Applicant(s)

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Date: 03/28/06

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PATENT APPLICATION
Attorney Docket No: 10005378-1



**IN THE UNITED STATES PATENT
AND TRADEMARK OFFICE**

Inventors: Diane R. Hammerstad **Examiner:** Arthur D. Duran

Application No: 09/768990 **Group Art Unit:** 3622

Filing Date: 01/23/2001 **Confirmation No:** 4199

Title: Delivery Of Time Significant Advertising

Assistant Commissioner for Patents
Washington, D.C. 20231

**APPELLANT'S BRIEF
UNDER 37 C.F.R. §41.37**

To The Commissioner of Patents and Trademarks:

The present brief is in furtherance of the Notice of Appeal mailed January 30, 2006 in connection with the above captioned application.

I. Real Party in Interest

The inventor has assigned all rights and interest in the above captioned application for patent to the Hewlett-Packard Company as evidenced by the assignment recorded at Reel 012026, Frame 0195 (2 pages) and subsequently reassigned to Hewlett-Packard Development Company evidenced by the assignment recorded at Reel 014061, Frame 0492.

II. Related Appeals and Interferences

No other appeals or interferences are pending in the above captioned application.

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HEWLETT-PACKARD COMPANY
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**IN THE UNITED STATES PATENT
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Assistant Commissioner for Patents
Washington, D.C. 20231

**APPELLANT'S BRIEF
UNDER 37 C.F.R. §1.192**

To The Commissioner of Patents and Trademarks:

The present brief is in furtherance of the Notice of Appeal mailed January 30, 2006 in connection with the above captioned application.

I. Real Party in Interest

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II. Related Appeals and Interferences

No other appeals or interferences are pending in the above captioned application.

III. Status of Claims

Claims 1-6 and 9-13 are pending in the present application and the rejections of these claims 1-6 and 9-13 are being appealed. Claims 1-6 and 9-13 have been finally rejected under 35 USC 103(a) in view of the combination of three references, at least one of which Appellant contends is not available as prior art.

IV. Status of Amendment

A proposed Amendment After Final Rejection was mailed on December 08, 2005 and provided Appellant's reasons for Appellant's belief that the invention claimed in the present application is not obvious in view of the cited references, particularly because one of the references is not prior art. Included with Appellant's Amendment After Final was an Inventor's Affidavit under 35 U.S.C. 131, evidencing Inventor's claim of priority of invention. Examiner denied a request for reconsideration, based upon the §131 Affidavit, for what Appellant believes to be improper and ultra vires reasons. Appellant filed a Pre-Appeal Request for Review of clear error, the result of which review is to now proceed to appeal.

V. Summary of Claimed Subject Matter

The present invention is directed to a service provider server for, and a process of, delivering content and time significant advertising from a server to a subscriber. In order to better target advertising to an individual, the significance of the time value of the advertising and its relevance to a profile of a subscriber is considered when an advertisement is combined with content desired by the subscriber. (Page 3, lines 14-16).

Independent claim 1 claims a method of delivering content including the step of accepting a subscriber profile with an advertising preference and a time of delivery

preference. Description of a preferred embodiment of this step is found at page 5, lines 7-16 and reference element 207 in FIG.2. The subscriber profile is stored at the server as described for a preferred embodiment at page 5, lines 23-26 in conjunction with reference element 131. An advertising attribute and a time significance is determined for an advertisement as described for a preferred embodiment at page 7, lines 6-8 in conjunction with reference elements 407 and 409 in FIG. 4. The stored subscriber advertising preference is recalled at the server as described for a preferred embodiment at page 9, lines 4-8 and reference elements 507 and 509 in FIG. 5. The subscriber advertising preference is compared to the attribute as described for a preferred embodiment at page 8, lines 1-4 and element 411 of FIG. 4, and the current time is compared to the time significance as described for a preferred embodiment at page 8, lines 3-4 and element 417 in FIG. 4. The subscriber's current time is determined as described for a preferred embodiment at page 7, lines 13-21. The advertisement is included with the content at the server when the current time matches the time significance and the subscriber advertising profile matches the attribute as described for a preferred embodiment at page 9, lines 12-16 and lines 25-26 and at page 10, lines 1-2 and elements 511, 521, and 529 in FIG. 5. The content with included advertisement is delivered from the server to the subscriber when the current time determination matches the time of delivery preference as described for a preferred embodiment at page 6, lines 12-25 and reference element 307 in FIG. 3.

With regard to dependent claim 2, a preferred embodiment of the steps of recalling a postal code and mapping a local time zone is described at page 7, lines 16-21 and reference elements 413 and 415 in FIG. 4.

With regard to dependent claim 3, a preferred embodiment of the step of recalling at least one previously stored attribute is described at page 9, lines 12-14 and reference element 507 in FIG. 5.

With regard to dependent claim 4, a preferred embodiment of the step of recalling a previously stored time period associated with the advertisement is described at page 9, lines 21-25 and reference element 517 in FIG. 5.

With regard to dependent claim 5, a preferred embodiment of the step of determining whether the current time is within the time period is described at page 9, lines 25-30 and reference elements 519 and 521 in FIG. 5.

With regard to dependent claim 6, a preferred embodiment of the step of delivering the content and advertisement from the server to the user in accordance with the request of the subscriber is described at page 9, line 12 - page 10, line 3 and reference element 513 in FIG. 5.

Independent claim 9 claims a service provider apparatus that delivers content and time significant advertising to a subscriber from a network and includes a memory that stores a subscriber profile with an advertising preference and a time of delivery preference. Description of a preferred embodiment is found at page 5, lines 23-26 and reference element 131 in FIG. 1. Claim 9 includes at least one network interface (reference element 125 in FIG. 1) as described for a preferred embodiment at page 4, lines 23-27. A clock generates a current time associated with the subscriber as described for a preferred embodiment at page 7, lines 23-30 and reference element 129 in FIG. 1. A processor for a preferred embodiment is shown as reference element 127 in FIG. 1. The subscriber advertising preference is compared to the attribute as described for a preferred embodiment at page 8, lines 1-4 and element 411 of FIG. 4, and the current time is compared to the time significance as described for a preferred embodiment at page 8, lines 3-4 and element 417 in FIG. 4. The advertisement is included with the content when the current time matches the time significance and the subscriber advertising profile matches the attribute as described for a preferred embodiment at page 9, lines 12-16 and lines 25-26 and at page 10, lines 1-2 and elements 511, 521, and 529 in FIG. 5. The content with included advertisement is delivered from the server to the subscriber when the current time determination matches the time of delivery preference as described for a preferred embodiment at page 6, lines 12-25 and reference element 307 in FIG. 3.

With regard to dependent claim 10, a preferred embodiment of the stored postal code and the mapping of a local time zone is described at page 7, lines 16-21 and reference elements 413 and 415 in FIG. 4.

With regard to dependent claim 11, a preferred embodiment of the stored time period associated with the advertisement is described at page 9, lines 21-25 and reference element 517 in FIG. 5.

With regard to dependent claim 12, a preferred embodiment of the processor adapted to compare whether the current time to the time period to determine whether the current time is within the time period is described at page 9, lines 25-30 and reference elements 519 and 521 in FIG. 5.

With regard to dependent claim 13, a preferred embodiment of the processor adapted to deliver the content and advertisement to the user via at least one network interface in accordance with a delivery request of the subscriber is described at page 9, line 12 - page 10, line 3 and reference element 513 in FIG. 5.

VI. Grounds of Rejection to be Reviewed on Appeal

Whether Examiner has followed the Rules of the US Patent and Trademark Office in considering and deeming Appellant's §131 affidavit ineffective and whether claims 1-6 and 9-13 should remain rejected under 35 U.S.C. 103(a) should a cited reference no longer be deemed prior art.

VII. Argument

Appellant believes Examiner has acted beyond the scope of authority delegated to him by independently and arbitrarily creating new rules for the US Patent and Trademark Office and by ignoring present rules duly adopted by the US Patent and Trademark Office.

35 U.S.C. 102(e) states that: "A person shall be entitled to a patent unless ..." with definitive reasons for denying the grant of a patent. This is a positive recitation that an applicant starts with a right to a patent grant which can be denied only for reasons that have been studied and promulgated in lawmaking and rulemaking procedures. Such denial, to be fair to all, must be done in accordance with rules that are known to all and applied equally. In this case fair denial has not been done.

The Application has been finally rejected under 35 USC 103(a) as being unpatentable over USP 5,937,392 to Alberts ("Alberts") in view of USP 6,047,327 to Tso et al. ("Tso") in view of US Patent Application No. 2002/0082912 to Batachia ("Batachia"). In the Final Office Action mailed October 31, 2005, Examiner stated that Appellant's Amendment filed on September 26, 2005 was sufficient to overcome the prior rejection. See Final Office Action mailed October 31, 2005, p. 2, "Response to Amendment". The prior rejection (Office Action, mailed May 20, 2005) rejected all claims under 35 USC 103(a) as being unpatentable over Alberts in view of Tso. See Office Action mailed May 20, 2005, pp. 5 and 8. In view of these statements, Appellant concludes that Examiner believes only with the addition of the additional teachings of Batachia is the combination of Alberts, Tso, and Batachia capable of making obvious claims 1-6 and 9-13. But, Appellant contends, the Batachia is not prior art and therefore cannot be entangled with Alberts and Tso to create a §103(a) rejection.

In order to show that Batachia cannot be considered prior art, Appellant submitted an affidavit under 37 C.F.R. 1.131, declaring and showing facts that demonstrate prior invention by Appellant.

Statutory Bar under 35 U.S.C. 102(b).

In the Advisory Action mailed December 22, 2005, Examiner decided that the §131 Affidavit was ineffective in overcoming the Batachia reference, stating "The Applicant's priority date is 1/23/01. The priority date of the Batachia reference is 12/22/00. Therefore, the Batachia reference was filed more than one year before the Applicant's priority date and the Batachia reference qualifies as 102(b) prior art." The actual amount of time is 32 days; not greater than one year, as asserted. Prior to filing a Notice of Appeal and Pre-Appeal Brief, Appellant's attorney telephoned the Examiner and Examiner acknowledged the one year misstatement of time. Examiner mailed an Interview Summary on February 17, 2006 memorializing the conversation and withdrawing the §102(b) assertion.

Diligence.

The foregoing misstatement of the Batachia priority date is not the troubling factor, however. Examiner deemed the evidence submitted in the §131 Affidavit to not be sufficient to establish diligence in the reducing to practice of Appellant's invention.

Examiner recited form paragraph MPEP §7.62 in the December 22, 2005 Advisory Action and Examiner stated the standard that was acceptable to him for diligence was: "*Applicant must demonstrate daily and continued, detailed work on the invention from the date of the earliest sought priority date until the actual filing date.*" When questioned about this standard being applied for Appellant to overcome an alleged lack of diligence during the telephonic interview, Examiner graciously considered the matter and referred Appellant's attorney to MPEP sections 715.07(a) and 2138.06. Neither section requires "daily and continued, detailed work on the invention" from immediately before the reference priority date until Appellant's filing date, as Examiner has required of Appellant.

No matter how Appellant responds to this requirement, Appellant cannot provide a responsive answer to Examiner's extraordinarily high standard of work on the invention every day - Saturdays, Sundays, holidays included. However, Examiner's stated standard is not compliant with MPEP §§715.07(a) or 2138.06 or any other rule or judicial decision of which Appellant is aware. Examiner is acting ultra vires in this demand for and scope of evidence. If the Examiner continues to believe additional proof of diligence is required, the stated requirement for evidence of diligence must be revised to comply with the Rules of the US Patent and Trademark Office.

Examiner states in the December 22, 2005 Advisory Action that "...Applicant's evidence has no dates listed on it as whatever date information there was has been crossed out." Appellant has the right to redact dates in its evidence as MPEP §715.07 II explains. If Examiner believes necessary information is absent from the redacted exhibit, Examiner can refer to the oath or declaration.

Conception Date.

Examiner believes Applicant's affidavit to be ineffective to establish a conception of the invention prior to the priority date of Batachia. Examiner used form paragraph MPEP §7.61 to advise Appellant of Examiner's belief. However, Examiner did not follow the Rules of the Patent Office in advising Appellant. Examiner Note 2 under MPEP §7.61 requires: "An explanation of the deficiency in the showing of conception *must* be presented in bracket 2." Examiner did not explain any deficiency in the showing of conception, thereby leaving Appellant unable to effectively respond. Such an administrative agency

inaction in following its published rules can be construed to be an improper taking of Appellant's property should Appellant be otherwise entitled to a grant of patent.

Reduction to Practice.

Examiner believes the evidence submitted in Applicant's affidavit to be insufficient to establish a reduction to practice of the invention prior to the priority date of Batachia. Examiner used form paragraph MPEP §7.59 to advise Appellant of Examiner's belief. As above, Examiner did not follow the Rules of the Patent Office in advising Appellant. Examiner Note 2 under MPEP §7.59 requires: "An explanation of the lack of showing of the alleged reduction to practice *must* be provided in bracket 2." Examiner did not explain any deficiency in the showing of reduction to practice, again leaving Appellant unable to effectively respond.

Conclusion.

The current Final Office Action and subsequent Advisory Action have placed Appellant's rights in jeopardy by placing, in one instance, impossible and ultra vires requirements for Appellant to meet. And in other instances, not providing Appellant required information in order that A be enabled to effectively respond to Examiner's belief of the ineffectiveness of Appellant's §131 affidavit.

If, in fact, Appellant's §131 affidavit is effective, the Batachia reference cannot be deemed to be a prior art reference and only the Alberts and Tso references remain. In the Final Office Action mailed October 31, 2005, Examiner acknowledged Appellant's September 26, 2005 amendment as being sufficient to overcome obviousness rejections based upon these two references. Accordingly, Appellant believes the removal of Batachia as a reference places the present Application in a condition of allowability over Alberts and Tso.

Therefore, Appellant respectfully requests the Examiner be directed to withdraw the Advisory Action of December 22, 2005 as not comporting with the Rules of the US Patent and Trademark Office. If, in light of the current facts, Examiner continues to believe Appellant's §131 affidavit to be insufficient, Appellant respectfully requests that Examiner be directed to follow the rules explicitly set forth in the Manual of Patent Examining Procedure in issuing a new Advisory Action and a revised period of response thereto

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commencing from the mailing date of the new Advisory Action. If, however, Examiner now believes Appellant's §131 affidavit to be sufficient, Appellant respectfully requests that the present Application be returned to Examiner for allowance.

The text of the claims on appeal are double spaced and attached hereto as Appendix VIII. A copy of Appellant's §131 affidavit is attached hereto as Evidence Appendix IX.

Respectfully Submitted,

Diane R. Hammerstad

By: 
Raymond A. Jenski,
Attorney for Appellant
Reg. No. 31,267

VIII. CLAIMS APPENDIX

1. A method of delivering content and time significant advertising from a server to a subscriber comprising the steps of:

accepting a subscriber profile including an advertising preference and a time of delivery preference;

storing said subscriber profile at the server;

determining an attribute of and a time significance for an advertisement;

recalling at the server said stored subscriber advertising preference;

comparing said subscriber advertising preference to said attribute;

determining a current time of the subscriber;

comparing said current time to said time significance;

including said advertisement with the content at the server when said current time matches said time significance and said subscriber advertising profile matches said attribute; and

delivering the content and said included advertisement from the server to the subscriber when said current time determination matches said time of delivery preference.

2. A method in accordance with the method of claim 1 wherein said determining a current time further comprises the steps of:

recalling a postal code associated with the subscriber; and

mapping a local time zone correction established by said postal code to a time standard.

3. A method in accordance with the method of claim 1 wherein said determining an attribute further comprises the step of recalling at least one previously stored attribute associated with said advertisement.

4. A method in accordance with the method of claim 1 wherein said determining a time significance further comprises the step of recalling a previously stored time period associated with said advertisement and having time relevance to said advertisement.

5. A method in accordance with the method of claim 4 wherein said comparing said current time to said time significance further comprises the step of determining whether said current time is within said time period, thereby matching said time significance.

6. A method in accordance with the method of claim 1 further comprising the step of delivering the content and said included advertisement from the server to the user in accordance with a request of the subscriber.

7. (Cancelled)

8. (Cancelled)

9. A service provider server that delivers content and time significant advertising to a subscriber from a network, comprising:

a memory that stores a subscriber profile including an advertising preference and a time of delivery preference provided by the subscriber;

at least one network interface that accesses the network to obtain an advertisement, an attribute of said advertisement, and a time significance for said advertisement;

a clock at the server that generates a current time associated with the subscriber;
and

a processor coupled to said memory, said at least one network interface, and said clock and adapted to compare said subscriber advertising preference to said attribute, to compare said current time to said time significance, and to include said advertisement with the content when said current time matches said time significance and when said subscriber advertising preference matches said attribute, and to request delivery of the content and said advertisement from the server to the subscriber when said current time determination matches said time of delivery preference.

10. A service provider server in accordance with claim 9 further comprising a postal code stored in said memory and associated with the subscriber, and wherein said clock is adapted to map a local time zone correction established by said postal code to a time standard to generate said current time.

11. A service provider server in accordance with claim 9 wherein said time significance further comprises a time period associated with said advertisement and having time relevance to said advertisement.

12. A service provider server in accordance with claim 11 wherein said processor is further adapted to compare said current time to said time period to determine whether said current time is within said time period, thereby matching said time significance.

13. A service provider server in accordance with claim 9 wherein said processor is further adapted to deliver the content and said included advertisement to the user via a one of said at least one network interface in accordance with a delivery request of the subscriber.

14-16 (Cancelled)

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IX. EVIDENCE APPENDIX

The following affidavit was submitted by Appellant on 12/08/05 in a response to
Final Office Action mailed 10/31/05.

IN THE
UNITED STATES PATENT AND TRADEMARK OFFICE

Inventors: Diane R. Hammerstad Examiner: Arthur D. Duran

Application No: 09/768990 Group Art Unit: 3622

Filing Date: 01/23/2001 Confirmation No: 4199

Title: Delivery Of Time Significant Advertising

COMMISSIONER FOR PATENTS
PO Box 1450
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AMENDMENT UNDER 37 C.F.R. § 1.116

Dear Sir:

In response to the Office Action mailed 10/31/05, entry of the following amendment is requested:

Applicant has enclosed an Affidavit under 35 U.S.C. 131. No changes are made to the claims.

REMARKS

Examiner has stated in the 10/31/05 Office Action that Applicant's amendment filed on 09/26/05 is sufficient to overcome the prior rejection and that a new reference has been added to the 35 U.S.C. 103 rejection. Applicant takes this statement at its face value and understands that since neither USP 5,937,392 to Alberts ("Alberts") nor USP 6,047,327 to Tso et al. ("Tso"), alone or in combination, teaches or suggests the claimed invention, it is the new reference, US Patent Application No. 2002/0082912 to Batachia ("Batachia") that, when combined with the ineffective Alberts and Tso references, teaches or suggests the claimed invention.

Alberts has been discussed in a previous response. Examiner has made a few changes to the comments relative to Alberts that were not present in the earlier Office Actions. Specifically, Examiner notes that advertisements can be intensified at different times or issued upon certain triggering events. In response, Applicant notes that Alberts states: "Alternatively, an advertiser may want a concentration or intensification of ads at particular times, perhaps in response to a *profile of users*, e.g., different times for children versus adults, or for people accessing the site from home versus work." Col. 1, lines 43-50 (Italics added). It is instructive to observe that a profile of users is most definitely not the same as a user's profile. Once again, the problems being addressed by Albert and by Applicant are different and Applicant's claims reflect the difference: "accepting a subscriber profile including an advertising preference and a time of delivery" (claim 1). Thus, Applicant's claimed invention is for an individualized subscriber ("delivering the content...to the subscriber when said current time determination matches said time of delivery preference" (claim 1)) not for a class of users, e.g. children, preselected by Alberts' web site administrator: "It would be desirable for a web site administrator that sells ads based on a number of hits per day to have an efficient way to cause the appropriate number of ads to be served and to be able to adapt to different situations in a flexible manner." Col. 1, lines 49-52. In summary, Alberts does not disclose:

- a) an accepting of a subscriber profile including an advertising preference and a time of delivery preference,
- b) a storing of the subscriber advertising profile at the server,
- c) a determining an attribute of and a time significance for an advertisement,
- d) a comparing of the subscriber advertising preference to the attribute,
- e) a determination of a current time of the subscriber,
- f) a comparing of the current time to the time significance, and
- g) a delivering of the content and the included advertisement ...when the current time determination matches the time of delivery preference.

Tso has been introduced to supply the missing elements and has been discussed in earlier responses. Tso's server, a17, contains positional information for its users and a user profile that is contained in a subscriber database 53 "...including such information as

gender, income, interests, employment and other demographic information". Col. 4, lines 36-39. The subscriber database is, itself, stored at least at Tso's user home Infocast server. Note that the specific requirements of subscriber advertising preference and subscriber time of delivery, important elements in Applicant's system and claimed invention, are missing from Tso's subscriber database. Consequently, the subscriber advertising preference and the subscriber time of delivery cannot be found stored at Tso's server. Therefore, if we combine the best disclosures and suggestions from Tso with Alberts, we still do not realize the claimed invention because the following elements are missing:

- a) an accepting of a subscriber profile including an advertising preference and a time of delivery preference,
- b) a storing of the subscriber advertising profile at the server,
- d) a comparing of the subscriber advertising preference to the attribute, and
- g) a delivering of the content and the included advertisement ...when the current time determination matches the time of delivery preference.

In the current rejection, Batachia is introduced to overcome the missing elements. Since Batachia is not an effective reference, its combination with Alberts and Tso is improper. Alberts and Tso, together and alone, do not make Applicant's claimed invention obvious. Applicant's earlier response has been deemed sufficient to overcome the obviousness rejection based on the combination of Tso and Alberts.

Accordingly, since neither Alberts nor Tso, taken alone or in combination, teach or suggest the invention as now claimed and Batachia cannot be an effective reference, a rejection of the claims under 35 U.S.C. §103 is not proper. Therefore, in view of the foregoing, Applicant believes the present Application to be in a condition suitable for allowance. Examiner is respectfully urged to enter the present Amendment, withdraw the rejections, and pass the present Application to allowance. In the alternative, Examiner is urged to enter the present Amendment as placing the present Application in a condition better suited for review upon appeal.

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